

INTERMOUNTAIN EXPLORATION CO.

IBLA 83-835

Decided October 24, 1983

Appeal from the decision of the Nevada State Office, Bureau of Land Management, declaring lode mining claim NMC 133559 null and void ab initio.

Reversed.

1. Mining Claims: Tunnel Sites -- Mining Claims: Withdrawn Land

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

APPEARANCES: Richard V. Wyman, President, Intermountain Exploration Company.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Intermountain Exploration Company has appealed the decision of the Nevada State Office, Bureau of Land Management (BLM), dated July 18, 1983, declaring the Becker lode mining claim, NMC 133559, null and void ab initio.

The Becker claim was located on September 27, 1979, within the NE 1/4 sec. 32, T. 17 N., R. 21 E., Mount Diablo meridian. BLM found that the claim lies within 2,004 feet of the center line of the Sutro tunnel and that its records show that such lands were segregated from mineral location and entry on July 25, 1866, by act of Congress on that date granting a right-of-way for a tunnel to Adolph Sutro.

In its statement of reasons, appellant argues that the Act of July 25, 1866, 14 Stat. 242, did not segregate the land from mineral location by surface discovery if the vein located was not discovered within the Sutro tunnel. Appellant urges that the Act granted a right-of-way, not mineral

title, and granted the right to purchase only such mineral veins and lodes within 2,000 feet on each side of the tunnel "as shall be cut, discovered or developed by running and constructing the same," exclusive of the Comstock lode and lodes previously discovered and in the possession of others. Appellant suggests that, although the right to purchase was not limited in time, 100 years to act is more than a reasonable time to do so. Appellant reports that the Becker claim was located on Federal land where no lode was discovered in the tunnel and no purchase was made and where the tunnel is now caved in and inaccessible. Appellant points out that tunnels located under the 1872 mining law were considered abandoned if work was not prosecuted for 6 months and the right to undiscovered veins was lost, citing Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108 (1897). Finally, appellant maintains that there could not have been any attempt to discover veins in the tunnel since it caved in 20 years ago and that surface discoveries of veins not purchased by Sutro, his heirs, or assigns are open to location.

[1] The Act of July 25, 1866, 14 Stat. 242, reads in part:

That, for the purpose of the construction of a deep draining and exploring tunnel to and beyond the "Comstock lode," so called, in the State of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct, and excavate a mining, draining, and exploring tunnel; also to sink mining, working, or air shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills near Carson River, and within the boundaries of Lyon County, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode; and the said right of way shall extend northerly and southerly on the course of said lode, either within the same, or east or west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel.

Sec. 2. And be it further enacted [emphasis in original], That the right is hereby granted to the said A. Sutro, his heirs and assigns, to purchase, at one dollar and twenty-five cents per acre, a sufficient amount of public land near the mouth of said tunnel for the use of the same, not exceeding two sections, and such land shall not be mineral land or in the bona fide possession of other persons who claim under any law of Congress at the time of the passage of this act, and all minerals existing or which shall be discovered therein are excepted from this grant; that upon filing a plat of said land the Secretary of the Interior shall withdraw the same from sale, and upon payment for the same a patent shall issue. And the said A. Sutro, his heirs and assigns, are hereby granted the right to purchase, at five dollars per acre, such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same, through its entire extent, with all the dips, spurs, and angles of such lodes,

subject, however, to the provisions of this act, and to such legislation as Congress may hereafter provide: Provided, That the Comstock lode * * * is excepted from this grant, and all other lodes * * * located within the said two thousand feet, and which are or may be, at the passage of this act, in the actual bona fide possession of other persons, are hereby excepted from such grant. [Emphasis supplied.]

We agree with appellant that this statute did not segregate the land within 2,000 feet of the Sutro tunnel from mineral entry. Sutro was granted a right-of-way to construct an 8-foot by 8-foot tunnel and the right to purchase mineral veins and lodes within 2,000 feet of the tunnel that were "cut, discovered, or developed by running and constructing" the tunnel. Although the statute excepted lodes already in the possession of others, it did not address later surface lode locations in the vicinity of the Sutro tunnel. Arguably, there was no need to do so; Sutro had been given only the right to the particular lodes discovered in constructing the tunnel and other lodes remained subject to location. At the time the statute at issue was enacted, Congress did not contemplate that the right to a lode necessarily involved the right to the surface of land containing the lode. This conclusion is demonstrated by examining a related action of Congress in the same time period. On the day following enactment of the Sutro tunnel grant, Congress passed the Mining Law of 1866, the first general Federal statute governing mining on the public lands. Act of July 26, 1866, 14 Stat. 251. Section 1 of that Act declared that "the mineral lands of the public domain, both surveyed and unsurveyed, are * * * to be free and open to exploration and occupation." The Act provided for the location and patenting of a lode or vein of a certain length rather than a tract of land and made no provision for surface boundary lines. The surface was considered incidental to the discovered lode; the extent of surface rights was frequently governed by local practice and did not become fixed until patent issued. 1 American Law of Mining, §§ 1.14, 1.15 (1980); Lindley on Mines, Vol. 1, § 58 (1914). Thus we conclude that Congress had no intention of setting aside the surface within 2,000 feet of the line of the Sutro tunnel for the exclusive use of Sutro, but only to grant him rights to lodes of a specific length. 1/

It is also useful to compare that portion of the Mining Law of 1872 known as the Tunnel Site Act, 30 U.S.C. § 27 (1976), with the Act of July 25, 1866, and the interpretation of the Tunnel Site Act as to the issue now on appeal. 30 U.S.C. § 27 (1976) provides that where a tunnel is run, the owner of the tunnel has the right of possession of all veins or lodes within 3,000 feet from the face of the tunnel that were not previously known to have existed and that were discovered in the tunnel to the same extent as if discovered from the surface. It continues that locations of veins or lodes not appearing on the surface made on the line of a tunnel by other parties after commencement of the tunnel and while the tunnel is being diligently prosecuted are invalid. This statute and the court decisions interpreting it have been

1/ We note as well that, although the Sutro tunnel is identified on BLM's status plat, there is no notation showing that the land is withdrawn from entry.

found to provide that surface locations on the line, or width of the bore, of the tunnel are prohibited and that surface locations subsequent to the tunnel location near but not on the line although not prohibited, are made at the peril of the locator because they would be subject to divestment upon the discovery of the same vein in the tunnel so long as the tunnel had not been abandoned. 1 American Law of Mining § 5.39 (1980). See generally 1 American Law of Mining, Title V, Ch. II, Art. 6, Tunnel Sites (1980).

If the same analysis were applied to the Sutro tunnel, appellant's claim would be simply subject to Sutro's prior rights to those veins and lodes cut, discovered or developed by running and cutting the Sutro tunnel, not null and void ab initio as found by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Nevada State Office is reversed.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge

